IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

* * *

NO. 78-467

* * *

ENNTEX OIL & GAS COMPANY (OF NEVADA), SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & GAS COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J.W. HEFLIN AND JOE B. OWEN,

Appellants

V.

THE STATE OF TEXAS,

Appellee

* * *

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TEXARKANA, TEXAS

* * *

MOTION TO DISMISS OR AFFIRM

* * *

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October 18, 1978

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IN THE

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October Term, 1978

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NO. 78-467

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ENNTEX OIL & GAS COMPANY (OF NEVADA), SPINDLETOP OIL & GAS COMPANY, OKLAHOMA COAL & GAS COMPANY, LA PRADA OIL & GAS COMPANY, TEXAS COAL & ENERGY COMPANY, PAUL E. CASH, J.W. HEFLIN AND JOE B. OWEN,

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THE STATE OF TEXAS,

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* * *

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TEXARKANA, TEXAS

* * *

MOTION TO DISMISS OR AFFIRM

* * *

TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES THE STATE OF TEXAS, Appellee, and pursuant to Rule 16, Rules of the Supreme Court, moves the Court to dismiss Appellants' appeal because the questions raised on appeal do not present a

substantial federal question for review, or, alternatively, to affirm the judgment of the court below.

Appellee agrees with the "Statement" contained in appellants' "Jurisdictional Statement" on file herein.

ARGUMENT AND AUTHORITIES

REQUIRING THE APPELLANTS TO REGISTER WITH THE STATE OF TEXAS THEIR SECURITIES SOLD EXCLUSIVELY TO NON-RESIDENTS OF TEXAS DOES NOT CREATE AN EXCESSIVE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE INTERSTATE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, AND, THEREFORE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

All of the Appellant companies engaged in and sold fractional interests in oil and gas leases located in Texas from within Texas. Telephone solicitations from Texas were made to potential investors throughout the United States. Investors were instructed to send their money to Texas. Letters and offering sheets were mailed to investors from Texas. The offering sheets were "put together" and printed in Texas. The wells were drilled in Texas. The bank accounts were maintained in Texas into which investor money was deposited. Even Appellants state that it is beyond dispute that there was activity with regard to the sales of the Schedule D interests within the State of Texas by all the Appellants. [Appellant of course contends that Spindletop was the exception because of its "unique position"].

The *ONLY* "non-Texas" aspect of Appellants' operation was the location of the *INVESTOR*. No sales were made to Texas residents.

Any discussion of the impact of state securities

regulation on interstate commerce must begin, as did TEX. ATT'Y. GEN. OP. NO. O-3193 (1941), (attached hereto as Appendix A), with the understanding that Congress has not acted to preempt this regulatory field. Indeed, to the contrary, Congress specifically stated in the Securities Act of 1933, that "[n]othing [herein] shall affect the jurisdiction of the securities commission. . .of any state. . . over any security or any person." 15 U.S.C. §77r (1964). This fact, coupled with an analysis of the cases that had dealt with and rejected Commerce Clause attacks on state blue sky laws, led the Attorney General to conclude that whether a Wyoming company desiring to use Texas as a base to sell Schedule D oil and gas interests was involved in interstate commerce was "immaterial" to the question of whether it was required to register its salesmen and securities in Texas.

Similarly, the court in *Shappley v. State*, 520 S.W.2d 766, 772 (Tex.Crim.App. 1957) rejected the defendant's Commerce Clause contention, emphasizing that the conduct sought to be regulated occurred primarily in the state only incidentally touched interstate commerce:

> Without any attempt to dispose of securities within a state, there is no regulation. Such reasoning is sound and supports the announced purpose of the [Securities] Act--to protect the public from fraud and imposition by those engaged in selling worthless securities. [citation omitted]. We, therefore, hold that any incidental burden on interstate commerce created by the Act is insubstantial and not unreasonable.

Likewise, the Ohio court in *Brown v. Market Developments, Inc.*, 322 N.E.2d 367, 374, (Ohio C.D. 1974), held the application of the Ohio Consumer Protection law to an Ohio corporation selling only to non-Ohions "does not impose an undue burden on

interstate commerce." The court specifically noted Ohio's clear and valid interest in promoting fair consumer practices and in regulating unfair consumer practices." (Id.) The interest of the State of Texas as evidenced in the Securities Act is strikingly similar: "to provide a more efficient means of preventing fraud in sales of securities." *Fowler v. Hults*, 138 Tex. 636, 161 S.W.2d 478, 481 (1942). The facts of the instant case make particularly important the Texas Supreme Court's explanation of the history of the Texas Securities Act and the evil it was designed to remedy. In *Kadane v. Clark*, 135 Tex. 496, 143 S.W.2d 197, 199 (1940), the Court said:

> The history relating to the sale of securities in this State is well known. The development of the oil industry emphasized the necessity of regulating sales of securities issued on oil leases and other instruments relating to the oil business. An enormous number of worthless securities were sold to the public, and nothing was realized on many of these investments by the buyers. There was no restraint upon such sales nor upon those who made them. The public was notoriously imposed upon, and ofttimes people were defrauded out of their life savings. There was a public demand for protection against such sales. The legislature sought to cope with the situation by enacting the Securities Act.

Appellants' constitutional attack upon the Act, like their efforts to wriggle from its broad, encompassing language is unavailing. The State's interest in regulating the securities market is obviously valid. It is well within its police power, and only incidentally affects interstate commerce. The broad and remedial Texas Securities Act, designed as it is to advance this interest, "should be given the widest possible scope".

Flowers v. Dempsey-Tegeler, 472 S.W.2d 112, 115 (Tex. Sup. 1971). Appellants' contorted and misleading construction of the Act is in derogation of the remedial policy of the Act and should be by this Court, rejected.

Appellants' basic argument is that the Texas Securities Act simply does not apply whenever a Texas company deals with out-of-state residents. The argument is pressed even further to suggest that such an interpretation would render the Act unconstitutional as an unreasonable hinderance to interstate commerce. It is very simply an argument too weighty to stand.

First, such an argument is totally at odds with the plain language of the Securities Act itself. TEX. REV. CIV. STAT. ANN. art. 581-7(1964) provides that no dealer, agent, or salesman shall "sell or offer for sale any security" that has not been registered. Similarly, TEX. REV. CIV. STAT. ANN. art. 581-12(1964) declares that no person, firm, corporation, or dealer "shall, directly or through agents or salesmen, offer for sale, sell or make a sale of any securities in this state without first being registered as in this Act provided." The Act then defines "sale", "offer for sale", and "sell" in the broadest possible terms:

> . . . shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise.* * * The term "sell" means any act by which a sale is made, and the term "sale" or "offer for sale", shall include a subscription, an option for sale, a solicitation for sale, a solicitation for an offer to buy, an attempt to sell or an offer to sell, directly or by an agent or salesman, by a

> circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this state of a letter, circular or other advertising matter. Nothing herein shall limit or diminish the full meaning of the terms "sale", "sell", or "offer for sale" used by or accepted in courts of law or equity . . . TEX. REV. CIV. STAT. ANN. art. 581-4E (1964)

The definition of "dealer", in turn, embraces, *inter alia*, anyone who is "offering for sale", or "selling" securities. TEX. REV. CIV. STAT. ANN. art. 581-4C (1964). Likewise, the injunction provision authorizes court action against any "person or company [that] has engaged in, is engaged in, or is about to be engaged in . . . fraudulent practices, or is selling or offering for sale any securities in violation of this Act or is acting as a dealer or salesman without being duly registered. . . " TEX. REV. CIV. STAT. ANN. art. 581-32 (1964).

It is further clear that the Act is to apply if *any act* in the selling process occurs within Texas. This was precisely the holding of the Houston Court of Civil Appeals in *Rio Grande Oil Co. v. State*, 539 S.W. 2d 917 (Tex. Civ. App.-Houston 1976, writ ref'd. n.r.e.). Rio Grande Oil Company was a schedule D company operating out of Houston, Texas, selling only to out-of-state residents, just as the Appellants here.

Appellants have stated that a "key to the Court's [Houston Court of Civil Appeals] ruling appears to be the finding that 'the acceptances were intended to be made and were made in Texas, so the sales were Texas ones.' 539 S.W.2d 917 at 922." The Appellants' almost unbelievably state:

> THERE IS NO TESTIMONY IN THE RECORD NOW BEFORE THIS COURT

> WHICH INDICATES THAT ACCEPTANCES WERE INTENDED TO BE MADE IN TEXAS.

It is important to note that each of and every Appellants' offering sheets, which were supplied to their customers, clearly states:

> THIS AGREEMENT SHALL BE DEEMED TO HAVE BEEN MADE, NEGOTIATED, *ACCEPTED*, EXECUTED AND DELIVERED *IN THE STATE OF TEXAS* AND SHALL BE DEEMED A TEXAS CONTRACT, *SUBJECT TO THE LAWS OF TEXAS*. (emphasis added)

For Appellants to make such an assertion to this Honorable Court is, at the least, deceptive and misleading to a gross degree!

Recently, the United States Court of Appeals for the Third Circuit had before it a similar extra-territorial jurisdiction question involving the Federal Securities Act, *SEC v. Kasser*, CA 3, No. 76-1332, January 14, 1977. There the defendants argued tha the transactions, essentially foreign in nature, were not intended to fall "within the ambit of the federal antifraud legislation."

On appeal, the Third Circuit quotes with approval Judge Friendly's language in *ITT v. Vencap, Ltd.*, 519 F.2d 1001, (CA 2 1975). Judge Friendly suggested that federal jurisdiction might exist even when the fraudulent acts had no impact within the United States. In rejecting an "effect" requirement, the Court stated that it did not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when they are peddled only to foreigners, and that the Court believed Congress meant to prohibit the SEC from policing such activities within this country.

Thus, in *Kasser*, the Federal Court held that U.S. citizens who conspire in the United States to violate the Federal Securities Act abroad are not shielded from the reach of the act's enforcement provisions. The situation before this Court is almost identical. Should Texas become a "Barbary Coast" harboring securities pirates who prey upon citizens of other states and run to refuge in the safe harbor of their home port? Appellee thinks not. To sustain Appellants argument would, as the Court in *Kasser* said, create a haven for such defrauders and manipulators.

Rio Grande, supra, spoke to the identical business situation and clearly is applicable to the case at bar--even though Cash and Heflin attempted to insulate themselves by creating several Schedule D companies rather than just "hanging out" with only one.

The court below did not err in holding that to require registration of securities sold exclusively to non-residents of Texas does not create an excessive burden on interstate commerce in violation of the interstate commerce clause of the United States Constitution and same does not present a substantial federal question for review.

APPELLEE HAS NOT APPLIED THE TEXAS SECURITIES ACT IN A MANNER WHICH VIOLATES APPELLANTS' RIGHTS OF EQUAL PROTECTION AND DUE PROCESS AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF TEXAS AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

Appellants erroneously contend that the granting of a Permanent Injunction violates their rights to equal protection and due process. Appellants argue that since injunctive relief was sought against them while

administrative redress in the nature of Cease and Desist Orders was sought against other Schedule D offerors similarly situated Appellants' were denied equal protection through application of the Texas Securities Act in an unequal manner.

Further, Appellants urge that the failure to announce publicly the implementation of more stringent enforcement of the Act against Schedule D offerors constituted a failure to provide notice to Appellants and, as such, violated their rights to due process.

These two contentions will be addressed respectively.

Appellants concede that the Act is not, on its face, violative of their equal protection or due process rights. Rather, they contend that merely seeking different remedies against similarly situated offerors constitutes discriminatory administration.

Clearly, discriminatory administration can constitute the basis for a claim of denial of equal protection. As stated by this Honorable Court, "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."*Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350 at 350, 38 S. Ct. 495 at 495 (1918). However, the law is equally clear that it is not enough to show that a statute has not been enforced against other persons as it is sought to be enforced against the person claiming discrimination, the precise contention of Appellants herein. *Mackay Telegraph & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100, 39 S. Ct. 428, 430 (1919).

In *Sunday Lake, supra*, at 495, this Court stated:

It is also clear that mere errors of judgment by

> officials will not support a claim of discrimination. There must be something more -- something which in effect amounts to an intentional violation of the essential principles of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. 247 U.S. at 350, 38 S. Ct. at 495. *Accord: Mackay Telegraph & Cable Co., v. City of Little Rock, supra*, 25 U.S. at 100, 39 S. Ct. at 430-31.

As stated in *Thompson v. Spear*, 91 F.2d 430, 433-34 (5th Cir. 1937), "[t]he fact that others have violated the law with impunity is no defense. It is only where the enforcement agency is vested with a discretionary power and exercises its discretion arbitrarily and unjustly that enforcement of valid regulation becomes violative of the equal protection clause."

Finally, in the recent case of *Super X Drugs of Texas, Inc. v. Texas*, 505 S.W.2d 333 (Tex. Civ. App. - Houston [14th Dist] 1974, no writ), the Court addressed the argument by Appellants herein as follows:

> . . . The crux of this argument is that the statute is unconstitutional as applied because of selective enforcement and discrimination. We do not agree. More must be shown than mere unequal application of a state statute to prove a violation of the equal protection clause. . . It is not sufficient to show only that the law is enforced against some and not others. There must be a showing of actual and purposeful discrimination against the individual himself or against a suspect classification in which he falls (such as wealth, religion or race) with no proper justifying governmental purpose in such classification. 505 S.W.2d at 336. *Accord:*

> *Armendariz v. State*, 529 S.W.2d 525, 527 (Tex. Crim. App. 1975).

To sustain Appellants' position would require a holding that selective enforcement as to Schedule D offerors, that is, the seeking of varying remedies *authorized by Texas law* for violation of the Act, constitutes arbitrary and unjust administration -- a patently absurd contention. Speaking to the question of legislative prerogative in fashioning remedies available under the Texas antitrust statutes, this Court, in *Tigner v. Texas*, 310 U.S. 141, 148, 60 S. Ct. 879, 882 (1940), stated:

> How to effectuate policy -- the adoption of means to legitimately sought ends -- is one of the most intractable legislative problems. Whether proscribed conduct is to be deterred by qui tam action or triple damage or injunction, or by criminal prosecution, or merely by defense to actions in contract or by some, or all, of these remedies in combination *is a matter within the legislature's range of choice.* (emphasis added)

With respect to Schedule D offerors, Appellee merely selected from those remedies specifically authorized by the Texas legislature. Since varied means of redress were available, varied means of redress were employed --best suited to the circumstances of the particular case-- as is Appellees' lawful prerogative.

The analogy between the policy determinations made with respect to Schedule D offerors and the policy determinations regularly made by criminal prosecutors further illustrate the weakness of Appellants' claim. In *United States v. Dalton*, 465 F.2d 32, 35 (5th Cir. 1972), the court rejected the claim of denial of due process and equal protection on the ground that the government accepted pleas from some co-defendants and granted immunity to another without affording appellant the

same treatment. [*Accord: Overstreet v. United States*, 367 F.2d 83 (5th Cir. 1966); *Brown v. Parratt*, 419 F.Supp. 44, 48 (D. Neb. 1976).] *See also: United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) [courts are not to interfere with the exercise of discretionary powers of United States Attorneys and their control over criminal prosecution]; *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) [two persons may have committed same legal offense, but prosecutor is not compelled by law, duty or tradition to treat them the same as to charges]

Further, as the Texas Court of Criminal Appeals squarely held in *Ex Parte Boman*, 268 S.W.2d 186 (Tex. Crim. App. 1954), "[t]he fact that a law may not be invoked against others could not in any wise affect its constitutionality because invoked against relator. As written, it is capable of uniform enforcement." 268 S.W.2d at 186. [*Accord: Ex Parte Breen*, 353 S.W.2d 233 (Tex. Crim. App. 1962); *Brundett v. State*, 354 S.W.2d 395, 396 (Tex. Crim. App. 1962)]

In sum, the choice of which of several available remedies to seek for violation of the Act, or, for that matter, the choice not to pursue any remedy in a given instance, is, and must be, a matter of prosecutorial discretion. That injunctive relief rather than administrative sanction was sought in the case now before this Court has in no way deprived Appellants of their rights of equal protection of the laws.

Appellants also contend that their rights to due process were violated because the Securities Commissioner failed to *"warn"* them of an increased enforcement effort against violators in the Schedule D business. This argument fails to recognize, however, the distinction between notice of enforcement and notice of prohibited conduct which is provided in the Act itself. The question is whether the *law itself* provided adequate warning to Appellants. Thus, the issue becomes

whether the statute withstands attack on the ground of vagueness.

As stated in *United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1542 (1947), the due process requirement is complied with by a statute whose language provides an adequate warning as to what conduct falls within its ambit, and marks boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972), this Court addressed the inquiry as follows:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . .

The Texas Securities Act, clear on its face, provided Appellants with more than adequate warning that their conduct was prohibited. Section 7, for example, warns that no dealer, agent, or salesman shall sell or offer for sale any security that has not been registered with the Commissioner.

Further, construction of the Act by the Attorney General of Texas *in 1941*, provides added support for the proposition that Appellants were provided adequate warning that their conduct was prohibited. And in *Brown v. Cole*, 291 S.W.2d 704, 708, (Tex. Sup. 1956), the Court noted that the terms "sale" or "offer for sale" were defined to include "every disposition or attempt to dispose of a security for value." Indeed, the Court, in

Brown, made it very clear that a "seller" may be any link in the chain of the selling process or . . . one who performs any act by which a sale is made."

Thus, the broad, clear and comprehensive nature of the Act itself, the existence of a 1941 Attorney General's Opinion directly applicable to the facts at hand, as well as the existence of judicial construction of the Act emphasizing its broad application, compel the conclusion that Appellants were *more* than adequately warned that the Act was applicable to "sales" or "offers for sale" of oil and gas interests made from Texas to non-residents.

The fact that prior to instituting an intensified enforcement effort no announcement to that effect was hand delivered to Appellants with a certificate suitable for framing is of no moment where the law itself wholly comports with the due process requirement that adequate warning of prohibited conduct be provided. All that was required of Appellants was to avail themselves of the opportunity to read the law.

The Court below did not err in holding that Appellee has not applied the Act in a manner which violates the Appellants' rights to equal protection and due process of law and, therefore, does not present a substantial federal question for review.

WHEREFORE, PREMISES CONSIDERED, Appellee prays (1) that the Court dismiss Appellants' appeal because there is not presented a substantial federal question for review; (2) that the Court affirm the judgment of the Courts below; and (3) that the Court award appellee such costs and such other and further relief as it may show itself entitled to recover.

Respectfully submitted,

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October 18, 1978

CERTIFICATE OF SERVICE

This is to certify that on the 18 day of October, 1978, a true and correct copy of the foregoing Motion to Dismiss or Affirm was mailed, postage prepaid, to the Honorable Earl L. Yeakel, III, 1420 Americanbank Tower, Austin, Texas 78701, Counsel for Appellants.

Bill Flanary

BILL FLANARY

APPENDIX A

OPINION OF THE TEXAS ATTORNEY GENERAL

O-3193 (1941)

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

Gerald C. Mann
Attorney General

Honorable William J. Lawson
Secretary of State
Austin, Texas

Attention: Mr. Frank D. Wear

Dear Mr. Lawson:

Opinion No. O-3193
Re: Whether or not Western Petroleum Corporation, under the facts stated, is engaged in interstate commerce and related questions.

A request for opinion dated February 19, 1941, requested by your predecessor in office, Honorable M. O. Flowers, has been received and carefully considered by this department. We quote from said request as follows:

> "Honorable William B. Murray, attorney for the Western Petroleum Corporation, has requested this department for a ruling as to whether or not such corporation would be required to comply with either the issuer's provisions of the Texas Securities Act or the provisions as to registration of dealers and salesmen under the following state of facts:
>
> " 'Western Petroleum Corporation is a Wyoming corporation and has complied with the requirements of the Federal Securities Act of 1933 and the Federal Securities and

Exchange Act of 1934, as amended, by filing with the Commission the enclosed Schedule "D", consisting of 17 pages. The company has, and proposes to comply with all requirements of the Commission concerning reporting of sales, etc.

" 'The corporation does not propose to qualify in your state as a foreign corporation, nor do any intrastate business there, but proposes, however, to solicit offers for the purchase of royalties by resident salesmen who deduct commissions and remit the net sum with said offers, for acceptance or rejection, by the company in Wyoming.'

"The form or offer of purchase to be used by such company is enclosed herewith.

"This department would appreciate your opinion as to the following questions under the state of facts hereinabove set out:

"(1) Is such corporation under such state of facts engaged in interstate commerce?

"(2) If you have answered 'Yes' to the above question holding thereby that such corporation under such state of facts and its agents are engaged in interstate commerce would such corporation and its agents be violating the provisions of the Texas Securities Act if they have made no attempt to qualify under the issuer's provisions thereof?

"(3) If you have answered 'Yes' to the first question holding thereby that such corporation and its agents are engaged in interstate commerce would such corporation or its agents be violating the provisions of the Texas

Securities Act if they fail to register under the provisions of such Act pertaining to the registration of dealers and salesmen?"

The form or offer of purchase referred to by you is as follows:

"OFFER TO PURCHASE ROYALTY

"I, the undersigned, do hereby offer to purchase from Western Petroleum Corporation, a Wyoming corporation, a non-producing overriding royalty interest of ____ thousandth (____/10000th,) for the sum of _____ Dollars. This offer is not binding upon the corporation until accepted by its duly authorized officers in Wyoming, it being understood that this is an interstate commerce transaction. Receipt of the sum of _____ Dollars (together with a note in the sum of $_____), is hereby acknowledged. The undersigned also acknowledges receipt of a Schedule "D" relating to said non-producing overriding royalty interests.

"IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal this ____ day of _____, 194__.

"_____ _____
Salesman Name

"Accepted by:
Western Petroleum Corporation

"By _____ _____
Address"

It is well settled law that where the federal government has assumed full jurisdiction of matters within the scope of its power, its regulations are

exclusive within the field involved (See the case of Oregon-Washington R & N C. v. Washington (U.S.) 70 Law Ed. 482).

It has likewise been settled by the Supreme Court of the United States that state regulatory laws are valid unless congress has exclusively occupied the field or unless the state law directly burdens interstate commerce. (See authorities collated in opinion No. O-2459 of this department, a copy of which is enclosed herewith for your information.)

Section 77r of Title 15, U.S.C.A., a portion of the Federal Securities and Exchange Act, reads as follows:

> *"Nothing in this sub-chapter shall affect the jurisdiction of the Securities Commission (or any agency or office performing like functions) of any state or territory of the United States, or the District of Columbia, over any security or any person."* (Underscoring ours)

Judge St. Sure, of the Northern District of California, Southern Division, in construing the above quoted section, said:

> "Defendants also call attention to Sec. 18 of the Act of 1933, which provides for 'state control of securities' as indicative of the intention of Congress to limit its legislation to activities in interstate commerce. There is no merit in the contention. The most that can be said for the section is that it probably gives concurrent jurisdiction to the Securities and Exchange Commission and the State authorities. There is no doubt that the Securities and Exchange Commission has jurisdiction of the matters here complained of." Securities and Exchange Commission v. Timetrust, Inc., 28 Fed. Supp. 34.

The contention has been frequently made that "Blue Sky Laws" or "Securities Acts" impose burdens upon interstate commerce and are, therefore, unconstitutional. Such contentions were, however, rejected by the Supreme Court of the United States in the case of Hall vs. Geiger-Jones Company, 242 U.S. 539. Also see annotations in 87 A.L.R. 46 et seq.

It will be noted that the Texas Securities Act makes it *unlawful to offer for sale within the state* securities without first having secured the required license as well as to *sell within the state* without the required license. (See Section 12 of Article 600a, Vernon's Annotated Texas Civil Statutes.) The Securities Act of Michigan is similar to the Texas Securities Act. The Supreme Court of Michigan in the case of People v. Augustine, 204 N.W. 747, held that for the offense of negotiating for sale unapproved securities in Michigan the actual sale need not be consummated in Michigan. In other words the negotiations were had in Michigan and the sale was consummated in New York. The Michigan Supreme Court held this to be in violation of the Michigan Securities Act. Also see the case of First National Bank of Pineville v. Wilson, 55 S.W. (2d) 657, (Supreme Court of Kentucky).

We quote from the case of Bartlett v. Doherty, 10 F. Supp. 469, modified in some respects not material hereto in 81 F. (2d) 920, re-hearing denied 83 F. (2d) 920, certiorari denied 80 Law Ed. 1398, as follows:

> "In defendant's present brief the question is revived, it being argued that these sales of stock were New York transactions and valid under the laws of that state, and that any act of the New Hampshire Legislature which would invalidate them is unconstitutional as an undue burden on interstate commerce. It is argued that this view of the law has now been

determined by the United States Supreme Court.

"It seems to me that defendant's contention is answered by the Supreme Court in the case of Hall v. Geiger-Jones Co., 242 U.S. 539, 557, 37 S.Ct. 217, 223, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann. Cas. 1917C, 643. It appears that the contention of the plaintiff now made did not escape the attention of the Supreme Court, for it said: 'The next contention of appellees is that the law under review is a burden on interstate commerce, and therefore contravenes the commerce clause of the Constitution of the United States.* * * The provisions of the law, it will be observed, apply to dispositions of securities within the state, and while information of those issued in other states and foreign countries is required to be filed, * * * *they are only affected by the requirement of a license of one who deals in them within the state.* Upon their transportation into the state there is no impediment,--no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so, and this only that they may not appear in false character and impose an appearance of a value which they may not possess,--*and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such.*

" 'It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the state. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption

from regulation the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally.'

" . . .

"The next claim is that 'The sales were made in New York, the New Hampshire Blue Sky Law has no extra territorial effect and therefore cannot make these sales void.' I cannot accept this statement of the law. Many of the states in the Union have enacted so-called Blue Sky laws. If defendant's statement were true, all the defendant had to do was establish his office in New York City and flood the country with securities, good or bad, and claim immunity of any breach of law of any state so long as it retained at its home office the right to confirm or reject any sale made by its agents elsewhere. *If this is true the Blue Sky Law of New Hampshire and that of most other states may as well be scrapped.* See Bothwell v. Buckbee-Mears Co., 275 U.S.274, 48 S. Ct. 124, 72 L. Ed. 277; Chattanooga National Building & Loan Association v. Denson, 189 U.S. 408, 23 S. Ct. 630, 47 L. Ed. 870." (Underscoring ours)

The above case held that the New Hampshire Blue Sky Law, regulating sales of securities within the state without prohibiting interstate shipments was not unconstitutional as an undue burden on interstate commerce as applied to sales of stock in which orders were taken in New Hampshire and confirmations were made in dealer's New York office.

Whether or not the corporation involved herein is engaged in interstate commerce is entirely immaterial in view of our further answer with respect to the local agents.

Requiring the local agents to take out permits in no way burdens the interstate business of the corporation; if it should be held that such business is interstate commerce.

While the local agents in any event would be required to comply with the requirements of our Texas Securities Act, yet, in view of the fact that the local agents in the present instance contemplate soliciting only with respect to the securities issued by this particular corporation, it would not avail them to take out permits, seeing, that under the express terms of our Securities Act, they would not thereby be authorized to offer for sale securities of a foreign corporation or solicit orders for a foreign corporation which itself had not taken out an issuer's permit.

Section 5 of our Texas Securities Act declares:

> "No dealer, agent or salesman shall sell or offer for sale any securities issued after the passage of this Act, except those which come within the classes enumerated in subdivisions (a) to (q) both inclusive, of Section 3 of this Act, or subdivisions (a) to (i), both inclusive of Section 23 of this Act, until the issuer of such securities shall have been granted a permit by the Secretary of State, and no such permit shall be granted by the Secretary of State until the issuer of such securities shall have filed with the Secretary of State a sworn statement verified under the oath of an executive officer of the issuer and attested by the Secretary thereof, setting forth the following information: * * *"

In view of the above quoted Section it is our opinion that the local agents, even with a permit, would not be authorized to offer for sale the securities mentioned in your letter, unless and until the corporation shall have

been granted an issuer's permit by the Secretary of State.

APPROVED APR 25, 1941

s/s

FIRST ASSISTANT
ATTORNEY GENERAL

Very truly yours

Attorney General of Texas

By s/s

Wm. J. Fanning
Assistant

WJF:ej

APPROVED
OPINION
COMMITTEE
By s/s
Chairman